

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Occidental Chemical Corporation

v.

Docket No. EL02-121-007

PJM Interconnection, L.L.C. and
Delmarva Power & Light Company

ORDER ON REMAND

(Issued March 29, 2005)

1. This case is before the Commission on voluntary remand from the United States Court of Appeals for the District of Columbia Circuit.¹ At issue are the rulings set forth in our March 12, 2003 and July 28, 2003 Orders, in this proceeding, regarding our retroactive application of a rate design change.² For the reasons discussed below, we will grant rehearing of the July 28 Order.

Background

2. On August 16, 2002, Occidental Chemical Corporation (Occidental) filed a complaint in this proceeding, naming as the respondent, PJM Interconnection, L.L.C. (PJM). In its complaint, Occidental alleged that the retail service it had been offered by Delmarva Power & Light Company (Delmarva) would significantly increase the rates Occidental was previously required to pay Delmarva, under a retail rate freeze, due in part to PJM's improper calculation of its network access charge.

¹ *Delmarva Power & Light Company, et al., v. Federal Energy Regulatory Commission*, No. 03-1307 (D.C. Cir. October 29, 2004).

² *See Occidental Chemical Corporation v. PJM Interconnection, L.L.C., et al.*, 102 FERC ¶ 61,275 (March 12 Order), *order denying reh'g*, 104 FERC ¶ 61,142 (2003) (July 28 Order).

3. In an order issued by the Commission on October 10, 2002, we required PJM to explain further, or modify, its network access charge, including its use of curtailed load as an allocation factor.³ In its compliance filing, PJM defended its use of curtailed load as an allocation factor. However, in the March 12 Order, we rejected PJM's arguments, noting, among other things, that access charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation. Accordingly, we required PJM to remove its curtailed load add-back provision from its network access charge allocation factor and to make any conforming changes, as may be necessary. We also established a refund effective date of November 1, 2002.

4. On rehearing, the PJM Transmission Owners Group (TO Group) challenged the refund effective date established by the Commission in the March 12 Order on two grounds.⁴ First, the TO Group argued that the Commission's refund effective date of November 1, 2002 constituted an unlawful, retroactive rate in violation of section 206(b) of the Federal Power Act (FPA).⁵ Second, the TO Group asserted that our refund effective date violated our policy that changes in rate design be applied prospectively only because the customers to whom these rate design changes apply cannot alter their

³ See *Occidental Chemical Corporation v. PJM Interconnection, L.L.C., et al.*, 101 FERC ¶ 61,005 (2002). We noted that while part of the formula for allocating PJM's network access charge costs, *i.e.*, the component which is based on a customer's actual load (both firm and non-firm) coincident with the annual peak of the zone, was reasonable, PJM's practice of adding back curtailed load to its calculation appeared inconsistent with the underlying rationale of reducing a customer's costs when it reduces load during system peaks. We further noted that relying on curtailed loads to allocate PJM's access charge costs may create a disincentive for load serving entities (LSEs) to implement load response programs on their own systems, since LSEs would be charged for system costs regardless of whether they curtail load during system peaks. Based on these findings, we required PJM to revise section 34.1 of its open access transmission tariff (PJM OATT) by removing "curtailed load" as an allocation factor, or in the alternative provide an explanation of why such an allocation factor is warranted. *Id.* at P 15.

⁴ The TO Group is comprised of the following entities: Atlantic City Electric Company; Baltimore Gas and Electric Company; Delmarva, FirstEnergy Corp.; Potomac Electric Power Company, PPL Electric Utilities Corporation, and Public Service Electric and Gas Company.

⁵ 16 U.S.C. § 824e (2000).

consumption patterns on a retroactive basis.⁶ In the July 28 Order, we addressed and rejected the TO Group's statutory argument.⁷ However, we failed to address the issue of whether the policy enunciated by the Commission in *Consumers Energy* and *Union Electric* applies in this case.

5. On review, the refund effective date established in this proceeding is challenged again by two of the seven entities that make up the TO Group, *i.e.*, by Delmarva and the individual companies that comprise FirstEnergy Corp.⁸ For the purpose of addressing the equitable argument left unaddressed in the July 28 Order, the Commission sought and was granted remand of this case.

6. For the purposes of clarifying the record, Commission Staff issued a data request to PJM on December 16, 2004, requesting that PJM explain, among other things, the methodology by which revenues collected under section 34.1 of the PJM OATT are distributed to Transmission Owners and what options are available to Transmission Owners to recover revenue shortfalls. The data request also asked PJM to provide, for each Transmission Owner, a comparison of the revenue received from November 1, 2002 to March 12, 2003 (based on the payment of refunds and collection of surcharges) compared with the revenue that would have been received if no refunds or surcharges had been involved.

7. On January 18, 2005, PJM submitted its responses to the Commission's data request. In its responses, PJM explains that as a result of the refunds and surcharges required by the Commission's orders, the billing determinants used to determine Network Customers' bill changes. Specifically, PJM states that the load of any Network Customer with curtailed load decreased for the period November 1, 2002 through March 12, 2003. PJM states that these decreased loads also resulted in a change in some zones of the hour

⁶ See TO Group request for rehearing at 6-7, citing *Consumers Energy Company*, 89 FERC ¶ 61,138 at 61,138 (1999) (*Consumers Energy*) and *Union Electric Company*, 58 FERC ¶ 61,247 (1992) (*Union Electric*).

⁷ We noted that, in fact, our refund effective date post dated the filing of Occidental's complaint by the requisite time (60 days) required by section 206(b). See July 28 Order at P 11.

⁸ Jersey Central Power & Light Company; Metropolitan Edison Company; and Pennsylvania Electric Company.

and the annual zonal peak used to determine the monthly demand charge under section 34.1. Finally, PJM states that because the hour of an annual zonal peak may have changed (due to the revisions to section 34.1) the level of a Network Customer's load coincident with the annual zonal peak may have changed, resulting in either an over-collection or under-collection of revenue from the Network Customer during the period November 1, 2002 through March 12, 2003.

Discussion

8. We will grant rehearing of the July 28 Order. In the March 12 Order, we required PJM to determine both refunds and surcharges, based on a refund effective date of November 1, 2002. In doing so, the Commission's expectation was that its order would result in a reallocation among customers of the same revenue requirement, so that each transmission owner would receive the same amount of revenue (albeit with a different division of charges among PJM's customers).

9. PJM's response to Staff's data request makes clear, however, that under PJM's OATT, the elimination of curtailed load from PJM's methodology, as required by our order, caused a change in PJM's rate design, which, for the most part, resulted in a reduction in the revenue received by PJM's transmission owners. This occurred because the rate design used by the transmission owners to determine their transmission rates included a projection of curtailed load as part of the billing determinants utilized by PJM.⁹ Consequently, when curtailed load was removed, the total billing determinants decreased, which reduced, in turn, the revenue received by certain transmission owners.

10. The Commission's long-standing policy is that when a Commission action under section 206 of the FPA requires only a cost allocation change, or a rate design change, the Commission's order will take effect prospectively. In these cases, where the utility's cost-of-service, or revenue requirement, has not been found to be unjust and unreasonable, the Commission has found that it would be unfair to require the utility to suffer a loss in revenue for periods before it can file a new rate case. In *Union Electric*, we recognized that parties cannot alter past decisions made in reliance on a rate design then in effect. We also stated that retroactive implementation of such a rate design might

⁹ In other words, the transmission owners' revenue requirements were divided by billing determinants that included curtailed load.

result in an under-recovery of legitimate costs.¹⁰ Accordingly, while the Commission has the authority under the FPA to set a refund effective date earlier than the date of its order (as occurred here), we have also found that such a requirement would not be appropriate, or equitable, in the case of a rate design change where, as here, a transmission owner would not be permitted to make a rate filing to recover its legitimately incurred costs.

11. Applying this standard here, we agree that the removal of curtailed load is a rate design change that affected the way in which the rates at issue were calculated. Specifically, the rates on file were calculated based on the inclusion of curtailed load in the billing determinants. Thus, in calculating the transmission rate, the transmission owner's revenue requirement was divided by billing determinants that included curtailed load.¹¹ If curtailed load is removed from the billing determinants used by PJM to calculate its network access charge, but the underlying revenue requirement remains the same, the overall rate would be increased.

12. We also agree that the retroactive application of our order, back to the refund effective date, did not permit the transmission owners from altering their decisions made in reliance on the previously accepted rate design and did not give PJM's transmission owners an opportunity to file, under section 205, to change their rate designs to reflect

¹⁰ See 64 FERC at 63,468. The Commission has applied the same policy with respect to rate design and cost allocation issues when acting under section 5 of the Natural Gas Act, delaying the implementation of a section 5 decrease in one rate until the pipeline has had the opportunity to file under section 4 to increase the other rate affected by the rate design or cost allocation change. See *Great Lakes Gas Transmission, L.P.*, 57 FERC ¶ 61,140 at 61,443 (1991). In that case, we stated that when the Commission orders a rate decrease because of cost allocation or rate design changes, the pipeline in all likelihood, will want to make a corresponding and simultaneous increase in other rates to recover its cost of service. Accordingly, we stated that we would permit such changes, giving prospective effect to the increase and decrease consistent with the traditional policy of requiring rate design changes to be effective prospectively. See also *Tennessee Gas Pipeline Company*, 46 FERC ¶ 61,113 at 61,443 (1989).

¹¹ In *Entergy Services v. FERC*, No. 03-121, 2005 U.S. App. LEXIS 3772 (D.C. Cir., Mar. 8, 2005), the court found the policy against retroactive changes did not apply when the utility charged a customer the wrong rates under the wrong rate schedule. Here, by contrast, there is a change in the method by which the PJM transmission owners calculate their rates, *i.e.*, the elimination of curtailed load from the methodology.

the elimination of curtailed load.¹² Accordingly, the rate design changes required by the March 12 Order should be applied on a prospective basis, *i.e.*, effective as of the date of our order, March 12, 2003. We will direct PJM to determine refunds and surcharges to comply with this order, based on a prospective application of the rate design change required in the Commission's March 12 Order.

The Commission orders:

(A) Rehearing of the July 28 Order is hereby granted, as discussed in the body of this order; and

(B) PJM is hereby directed to determine refunds and surcharges to comply with this order, including interest, as allowed by 18 C.F.R. § 35.19a (2004), based on a prospective application of the rate design change required in the Commission's March 12 Order. A report detailing these refunds and surcharges shall be made by PJM within 60 days of the date that refunds and surcharges are made.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹² No transmission owner made such a filing with the Commission after the issuance of our order.